STATE OF MICHIGAN

COURT OF APPEALS

JOHN A. RAPANOS and RESTALL, INC.,

Plaintiffs-Appellants,

v

CITY OF MIDLAND, JAMES H. SCHROEDER, MARK OSTGARDEN, CLIFF MILES, KARL TOMION, DENNIS WOLF, RONALD W. FITCH, DONALD R. TAYLOR, JAMES R. STOUT, SR., JOHN COPPAGE, R. DRUMMOND BLACK, ROGER GOHRBAND, JOHN J. RAE, LINDA CAREY, CHARLES CARMICHAEL, JAMES FLYNN, THOMAS LIND, DAVID ROTHMAN, JOSEPH SCHMIDT, ALFRED SCHRETTER, MICHAEL CRONENBERGER, and THOMAS DEITSCH,

Defendants-Appellees.

UNPUBLISHED
July 24, 1998

No. 199909
Midland Circuit Court
LC No. 96-005198 CZ

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants summary disposition pursuant to MCR 2.116(C)(7) based on the doctrine of res judicata. Plaintiffs also appeal an order denying their motion to disqualify the lower court judge. We affirm.

I

The applicability of res judicata is a question of law that this Court reviews de novo. *Bergeron v Busch*, 228 Mich App 618, 620; ___NW2d ___(1998); *Eaton Co Bd of Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). Michigan courts have adopted a broad application of res judicata that bars "claims arising out of the same transaction that plaintiff *could have brought but did not*, as well as those questions that were actually litigated." *Bergeron, supra* at 621; *Jones v State*

Farm Ins Co, 202 Mich App 393, 401; 509 NW2d 829 (1993) (emphasis added). Generally, in order for the first action to bar the second, res judicata requires that: (1) the prior action was decided on the merits, (2) the matter contested in the second case was or could have been resolved in the first, and (3) both actions involved the same parties or their privies. *Bergeron, supra* at 221; *Energy Reserves Inc v Consumers Power Co*, 221 Mich App 210, 215; 561 NW2d 854 (1997). Res judicata bars relitigation of a claim "by the plaintiff against the defendant even though the plaintiff is prepared in the second action (1) to present evidence or grounds or theories of the case not presented in the first action, or (2) to seek remedies or forms of relief not demanded in the first action." Restatement Judgments, 2d, § 25.

Plaintiffs argue that the requirements of res judicata were not satisfied. We disagree. First, the grant of defendant's motion for summary disposition was a final adjudication on the merits. Restatement Judgments, 2d, §27, Comment d, p 255. Second, although not all of the issues were raised and resolved in the first action, plaintiffs' challenge to the zoning ordinance "properly belong[ed] to the subject of the litigation" of the applicability of the zoning ordinance to plaintiff Rapanos, and "exercising reasonable diligence, [plaintiff Rapanos] might have brought [it] forward at the time." *Eyde v Charter Twp of Meridian*, 118 Mich App 43, 49; 324 NW2d 775 (1982), quoting *Curry v Detroit*, 394 Mich 327, 332; 231 NW2d 57 (1975). The Restatement says, "[i]t is immaterial that the plaintiff in the first action sought to prove the acts relied on in the second action and was not permitted to do so because they were not alleged in the complaint and an application to amend the complaint came too late." Restatement Judgments, 2d, § 25, Comment b, p 210. Moreover, "[t]he fact that parties have reversed roles in subsequent suits, in the past, has not foiled the application of res judicata." *City of Detroit v Nortown Theatre, Inc*, 116 Mich App 386, 393; 323 NW2d 411 (1982).

In *Sprague v Buhagiar*, 213 Mich App 310; 539 NW2d 587 (1995), this Court held that res judicata barred an action that could have been brought as a counterclaim in the prior action, but was not. After a land contract between the plaintiff and the defendant had been rescinded, the plaintiff attempted to bring suit for fraud and misrepresentation arising out of the land contract. This Court affirmed the trial court's dismissal based on res judicata stating:

> The alleged fraud and misrepresentation clearly could have been raised as a counterclaim to the summary possession proceedings in the district court. . . . Further, as defenses or affirmative defenses, plaintiff's claims must have been raised in the earlier proceeding or are waived. . . . Thus, under this state's broad rule of res judicata, plaintiff's claims are barred.
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> "Michigan follows a broad rule of res judicata which bars not only claims actually litigated in the prior action, but every claim arising out of the same transaction which the parties, exercising reasonable diligence, could have raised but did not." [*Id.* at 313.]

In the case at bar, Rapanos attempted to litigate constitutional claims arising from the enforcement of the zoning ordinance after the action for the zoning ordinance had been decided. Based on the principles of broad res judicata, these claims were properly barred because they should have been brought as defenses or counterclaims in the first action. "[R]es judicata . . . bars the defendant from attacking a judgment because of new defenses to the plaintiff's claim, even though he was not aware of them at the time of the judgment." *Eyde, supra* at 50.

Finally, for res judicata to apply, there must be privity of parties. This Court has held that the shareholder of a closed corporation is in privity with the corporation for the purposes of res judicata. *Wildfong v Fireman's Fund Ins Co*, 181 Mich App 110, 116; 448 NW2d 722 (1989). In the instant case, the order granting summary disposition to defendant city applied to Rapanos and also, "all agents, corporations, partnerships, business organizations of any kind, members of his family or other individuals, agents or associates of John Rapanos and his heirs and assigns." Additionally, "the stockholders of a corporation may rely on and are bound by the final judgments, orders and decrees for or against the corporation, and this is usually true regardless of whether or not the stockholder was a party to or active participant in the original litigation." *Knowlton v City of Port Huron*, 355 Mich 448, 453-454; 94 NW2d 824 (1959). We can find no reason in the present case to find that Rapanos and Restall were not in privity with each other with respect to the first action between Rapanos and defendant city.

II

Plaintiffs next argue that the trial court erred when it denied plaintiffs' motion to disqualify the trial judge. Again, we disagree. Under MCR 2.003, a party may make a motion to disqualify a judge on the grounds of impartiality if a judge, "is personally biased or prejudiced for or against a party or attorney[.]" MCR 2.003(B)(1). "[T]he party who challenges a judge on the basis of bias or prejudice must overcome a heavy presumption of judicial impartiality." *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996); *In re Forfeiture of $1,159,420*, 194 Mich App 134, 151; 486 NW2d 326 (1992).

In *Cain, supra* at 495-497, the Michigan Supreme Court stated:

> . . . a showing of "personal" bias must usually be met before disqualification is proper. This requirement has been interpreted to mean that disqualification is not warranted unless the bias or prejudice is both personal and extrajudicial. Thus, the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding. The United States Supreme Court addressed the "personal" bias requirement in *Liteky v United States*, 510 US 540, 550; 114 S Ct 1147; 127 LEd2d 474 (1994), and stated that the words "bias" and "prejudice"
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> "connote a favorable or unfavorable disposition or opinion that is somehow *wrongful* or *inappropriate,* either because it is undeserved, or because it rests upon knowledge that the subject ought not to possess . . ., or because it is excessive in degree. . . ." (Emphasis in original.)

* * *

> . . . *Liteky* indicates that a favorable or unfavorable predisposition that springs from facts or events occurring in the current proceeding may deserve to be characterized as "bias" or "prejudice." However, these opinions will not constitute a basis for disqualification "*unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible*." [*Id.* (emphasis added).]

Furthermore, "[r]epeated rulings against a litigant, no matter how erroneous, and how vigorously and consistently expressed, are not disqualifying." *People v Houston*, 179 Mich App 753, 759; 446 NW2d 543 (1989), quoting, *Mahlen Land Corp v Kurtz*, 355 Mich 340, 350; 94 NW2d 888 (1959).

We have reviewed the transcripts and conclude, consistent with the acting chief judge's determination, that the trial judge was frustrated by plaintiffs' attorney, his argument and his delay. Any comments made by the trial judge reflected "a distaste for the counsel's contentiousness and for the circumstances of the case." *People v Mixon*, 170 Mich App 508, 514; 429 NW2d 197 (1988), rev'd in part on other grounds 433 Mich 852 (1989). Plaintiffs in this case have failed to demonstrate how two comments from the trial judge constituted bias or prejudice that was either extrajudicial or excessive in degree. *Cain, supra* at 495-497.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.